

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

ALBY ARDELL SMITH,

08-CV-312-HU

Petitioner,

ORDER

v.

GUY HALL,

Respondent.

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BROWN, Judge.

Magistrate Judge Dennis James Hubel issued Findings and Recommendation (#36) on March 10, 2010, in which he recommends the Court deny Petitioner Alby Ardell Smith's Petition for Writ of Habeas Corpus (#1), dismiss this matter with prejudice, and deny Petitioner a Certificate of Appealability. Petitioner filed timely objections to the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). *See also United States v. Bernhardt*, 840 F.2d 1441, 1444 (9th Cir. 1988); *McDonnell Douglas Corp. v. Commodore Business Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

This Court has reviewed the pertinent portions of the record *de novo*. Based on the foregoing, the Court adopts that portion of the Findings and Recommendation in which the Magistrate Judge recommends the Court deny the Petition for Writ of Habeas Corpus and dismiss this matter with prejudice.

With respect to the Certificate of Appealability, the Supreme Court has held:

[W]hen the district court denies a habeas petition

on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 478 (2000). The court must resolve any "doubts about the propriety of a COA in the petitioner's favor." *Rhoades v. Henry*, 598 F.3d 511, 518 (9th Cir. 2010). This Court finds Petitioner has established "jurists of reason would find it debatable whether his petition states a valid claim of the denial of a constitutional right."

Accordingly, the Court does not adopt that portion of the Findings and Recommendation in which the Magistrate Judge recommended the Court deny Petitioner a Certificate of Appealability.

CONCLUSION

For these reasons, the Court **ADOPTS** that portion of Magistrate Judge Hubel's Findings and Recommendation (#36) in which he recommends the Court deny the Petition (#1) for Writ of Habeas Corpus and **DISMISSES** this matter **with prejudice**.

The Court **DECLINES to ADOPT** that portion of the Findings and Recommendation in which the Magistrate Judge recommends the Court

deny Petitioner a Certificate of Appealability.

IT IS SO ORDERED.

DATED this 3rd day of August, 2010.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge